

No. 145, Original

In the Supreme Court of the United States

STATE OF DELAWARE,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA AND
STATE OF WISCONSIN,

Defendants.

On Bill of Complaint in Original Action

**COMMONWEALTH OF PENNSYLVANIA'S
BRIEF IN RESPONSE TO STATE OF
DELAWARE'S MOTION FOR LEAVE
TO FILE BILL OF COMPLAINT**

Matthew H. Haverstick*
Mark E. Seiberling
Joshua J. Voss
KLEINBARD LLC
One Liberty Place, 46th Floor
1650 Market Street
Philadelphia, PA 19103
(215) 568-2000
(215) 568-0140 (fax)
mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com

Christopher B. Craig
Chief Counsel
Treasury Department
Office of Chief Counsel
127 Finance Building
Harrisburg, PA 17120
(717) 787-2740
ccraig@patreasury.gov

*Attorneys for Commonwealth
of Pennsylvania*

**Counsel of Record*

Dated: June 13, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. BACKGROUND STATEMENT 3

 A. The Disposition of Abandoned Money
 Orders and Traveler’s Checks Act 3

 B. The MoneyGram “Official Checks” 4

 C. Pennsylvania’s Examination of
 MoneyGram 6

 D. The Middle District of Pennsylvania
 Action 7

III. ARGUMENT 9

 A. This dispute involves sovereign state
 interests in the custody of unclaimed
 property, which is historically the precise
 type of “serious and dignified” claim
 this Court considers in its original
 jurisdiction 11

 B. This is an appropriate case for the
 exercise of the Court’s discretion 12

IV. CONCLUSION 14

TABLE OF AUTHORITIES

CASES

<i>Connecticut ex rel. Blumenthal v. Cahill</i> , 217 F.3d 93 (2d Cir. 2000)	11, 12
<i>Delaware v. New York</i> , 507 U.S. 490 (1993)	9, 11
<i>Mississippi v. Louisiana</i> , 506 U.S. 73 (1992)	10, 12
<i>MoneyGram Int’l, Inc. v. Comm’r of IRS</i> , 144 T.C. 1 (2015), <i>appeal filed</i> , No. 15-60527 (5th Cir.)	5
<i>Nebraska v. Colorado</i> , 136 S. Ct. 1034 (2016)	10, 13
<i>Ohio v. Wyandotte Chemicals Corp.</i> , 401 U.S. 493 (1971)	10
<i>Pennsylvania v. New York</i> , 407 U.S. 206 (1972)	3, 9
<i>Standard Oil Co. v. New Jersey</i> , 341 U.S. 428 (1951)	11
<i>Taylor v. Yee</i> , 136 S. Ct. 929 (2016)	2, 13
<i>Texas v. New Jersey</i> , 379 U.S. 674 (1965)	<i>passim</i>
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983)	10
<i>Western Union Tel. Co. v. Com. of Pa.</i> , 368 U.S. 71 (1961)	9, 12

CONSTITUTION

Pa. Const. Art. IV, § 1	1
U.S. Const. Art. III, § 2, cl. 2	10

STATUTES

12 U.S.C. §§ 2501-2503	2, 3
12 U.S.C. § 2501(2)-(3)	4
12 U.S.C. § 2503	3
28 U.S.C. § 1251(a)	10
71 P.S. § 732-204(c)	1
72 P.S. § 1301.24(a)	1

OTHER AUTHORITIES

Matthew Alright, <i>Supreme Court Calls Out Delaware on Unclaimed Property</i> , Delaware Online (Mar. 9, 2016), available at http://www.delawareonline.com/story/news/local/2016/03/09/supreme-court-unclaimed-property/81524700/	13, 14
Brief of Petitioners, <i>MoneyGram Int'l, Inc. v. Comm'r of IRS</i> , Nos. 12231-12, 30309-12, 2014 WL 7795630 (T.C. Feb. 28, 2014)	5
Complaint, <i>Treasury Department of the Com. v. Delaware State Escheator</i> , No. 16-cv-351-JEJ, Doc. 1 (M.D. Pa. Feb. 26, 2016)	7

Delaware State Escheator Memo. of Law, *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 26 (M.D. Pa. Apr. 20, 2016) 7, 8

Gregor decl., *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 25-3 (M.D. Pa. Apr. 20, 2016) 8

MoneyGram Memo. of Law, *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 30 (M.D. Pa. Apr. 25, 2016) 7

Order, *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 44 (M.D. Pa. May 23, 2016) 8, 9

Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387 (1995) 12

I. INTRODUCTION

The Commonwealth of Pennsylvania concurs in the State of Delaware's pending Motion for Leave to File Bill of Complaint.¹ This is an interstate dispute over the right to custody of certain abandoned intangible property; a core area of State sovereign interest. Though this dispute presently concerns only three States by name—Delaware, Pennsylvania, and Wisconsin—it will have a direct impact on all 50 States by potentially redistributing in excess of several hundred million dollars *immediately* and on an *annual* basis going forward.² This is so because Delaware's complaint asks the Court to resolve a dispute among the States regarding the meaning of the Disposition of Abandoned Money Orders and Traveler's Checks Act,

¹ Timothy A. Reese is the Treasurer of the Commonwealth of Pennsylvania; the Treasurer is an independently elected constitutional officer. *See* Pa. Const. Art. IV, § 1. Treasurer Reese is exclusively responsible under State law for receiving and pursuing abandoned and unclaimed property in the name of, and on behalf of, the Commonwealth. *See* 72 P.S. § 1301.24(a); 71 P.S. § 732-204(c). Therefore, with the consent of the Attorney General of Pennsylvania, the Commonwealth of Pennsylvania is represented in this action by counsel for Treasurer Reese.

² On June 8, 2016, the States of Arkansas, Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and West Virginia filed a Motion for Leave to File Bill of Complaint with this Court, asking leave to file a complaint against the State of Delaware. In their proposed complaint, the foregoing States seek relief from Delaware's unlawful interpretation of the Disposition of Abandoned Money Orders and Traveler's Checks Act.

12 U.S.C. §§ 2501-2503, which act sets specific interstate escheat priority rules.

Further still, if the Court agrees with one of Delaware's arguments that this matter is not controlled by the Disposition Act at all but by the common law escheat rules from *Texas v. New Jersey*, 379 U.S. 674 (1965), then this dispute truly is a quintessential original jurisdiction dispute. For, should the Court need to reach that argument, Pennsylvania will ask the Court in counterclaims to consider whether those common law rules continue to make sense in a modern technology society, particularly where certain "cash-strapped" States like Delaware "have a real interest in taking advantage of truly abandoned property to shore up state budgets." *Taylor v. Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J. and Thomas, J., concurring in denial of certiorari). If the Court changes the common law escheat rules, then Delaware must dismantle its \$500 million per year interstate escheat industry, presently its third-largest source of state budget revenue.

In short, regardless of whether this matter is decided under the Disposition Act or the Court's own escheat rules, Delaware's claims and Pennsylvania's forthcoming counterclaims represent precisely the type of interstate dispute that must be filed in, and is appropriate for disposition in, the Court's original jurisdiction. Accordingly, Pennsylvania respectfully requests the Court grant Delaware's pending Motion and accept original jurisdiction over Delaware's complaint.

II. BACKGROUND STATEMENT

A. The Disposition of Abandoned Money Orders and Traveler's Checks Act

This dispute concerns which State—the State of purchase or Delaware—has the right to take custody of the sums payable on abandoned prepaid financial instruments known as “official checks,” which are sold by MoneyGram Payment Systems, Inc. In 1972, this Court addressed a similar interstate dispute in its original jurisdiction concerning the sums payable on abandoned prepaid instruments known as “money orders,” sold by Western Union. *See Pennsylvania v. New York*, 407 U.S. 206 (1972). Holding that such instruments were subject to the default common law rules from *Texas v. New Jersey*, 379 U.S. 674 (1965), the Court declared in the absence of record evidence of the address of the owner of the money orders, the State of Western Union’s corporate domicile (New York) had the superior right under federal common law to take custody of the outstanding sums. *Pennsylvania*, 407 U.S. at 214-16.

In direct response to the decision in *Pennsylvania v. New York*, Congress enacted the Disposition of Abandoned Money Orders and Traveler’s Checks Act (the “Disposition Act”), 12 U.S.C. §§ 2501-2503. The express purpose of the Disposition Act was to overrule the common law priority rules established by this Court as they concerned a “money order, traveler’s check, or similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable[.]” 12 U.S.C. § 2503. More precisely, under the Disposition Act, the sums payable on the instruments

listed are escheatable to the State where the instruments were purchased (provided, among other things, the holder's books and records show the State of purchase), rather than to the State of the holder's corporate domicile.

The Disposition Act recognized that the majority of prepaid instruments were purchased by residents of the State where purchased, and thus, allowing the sums payable on such abandoned instruments to escheat to that State was equitable. *See* 12 U.S.C. § 2501(2)-(3) (“The Congress finds and declares that ... (2) a substantial majority of [purchasers of traveler's checks and money orders] reside in the States where such instruments are purchased; [and] (3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment[.]”).

Based on the text, structure, history, and purpose of the Disposition Act, Pennsylvania and not Delaware is entitled to custody of the sums payable on the instruments at issue in Delaware's complaint.

B. The MoneyGram “Official Checks”

While seemingly the appropriate interstate disposition of abandoned prepaid instruments became a dead issue in 1974 with the enactment of the Disposition Act, the State of Delaware, through the Delaware State Escheator, has attempted to reanimate the issue in recent years by claiming custody over instruments sold by MoneyGram Payment Systems, Inc., a Delaware corporation. To illustrate, MoneyGram sells various prepaid instruments—checks whereby the

customer pays an upfront sum to receive a check pre-printed with the exact value remitted by the customer. These instruments are identified by MoneyGram as “money orders” and “official checks.” With its so-called official checks, MoneyGram specifically describes them as “cashier’s checks, teller’s checks and agent checks.” Brief of Petitioners at 5, *MoneyGram Int’l, Inc. v. Comm’r of IRS*, Nos. 12231-12, 30309-12, 2014 WL 7795630 (T.C. Feb. 28, 2014) (hereafter, “MoneyGram Tax Brief”)³; see also *MoneyGram Int’l, Inc. v. Comm’r of IRS*, 144 T.C. 1, 7 (2015) (“Financial institutions provide clients with official checks, such as bank checks, cashier’s checks, and teller checks, for use in various transactions.”), *appeal filed*, No. 15-60527 (5th Cir.).

MoneyGram money orders and MoneyGram official checks are similar in a host of ways. For each, the customer of the instruments *prepays* the value to be reflected on the instrument. For each, the MoneyGram selling agent remits to MoneyGram the value received for the instrument. For each, the instrument reflects MoneyGram as the drawer/issuer and reflects MoneyGram’s own bank as the one upon which payment is redeemed. For each, the instrument issued, once cashed, will not be debited from the customer’s bank account, but rather from a bank account owned by MoneyGram. For each, the instrument, once cashed, will clear through the interbank system of the Federal

³ MoneyGram Payment Systems, Inc. is a wholly-owned subsidiary of MoneyGram International, Inc. See MoneyGram Tax Brief at 16 n.1. The brief in the Tax Court matter was submitted on behalf of both MoneyGram International and MoneyGram Payment Systems.

Reserve in the same way. Finally, for each, the purchasing customer has no direct way of knowing whether the instrument is ever processed for payment, since, again, the instrument is not debited from the customer's own account once cashed. It is this final facet of money orders and official checks that makes them susceptible to abandonment.

C. Pennsylvania's Examination of MoneyGram

Recently, Pennsylvania Treasurer Timothy A. Reese contracted with an outside auditor to review MoneyGram's books and records. The purpose of the audit was to discover whether MoneyGram possessed property that should have been/should be remitted to the custodial control of the Treasurer under Pennsylvania law. As a result of the audit, the Treasurer discovered that the sums payable on some 151,022 un-cashed official checks issued in Pennsylvania had been erroneously submitted to the Delaware State Escheator instead of the Pennsylvania Treasurer. Those checks covered years 2000 through 2009 and totaled some \$10,293,869.50. Treasury communicated the results of the audit to Delaware via the Delaware State Escheator.

Rather than correct the error, however, Delaware presented a novel, but faulty theory: the MoneyGram official checks are "third party bank checks" exempt from the Disposition Act's priority rules. In response to Delaware's position, the Pennsylvania Treasurer made multiple subsequent requests for payment, but Delaware refused to abandoned its mistaken view of the law.

D. The Middle District of Pennsylvania Action

In February 2016, on behalf of the Commonwealth, the Pennsylvania Treasury and the Pennsylvania Treasurer first filed suit in the District Court for the Middle District of Pennsylvania, naming as defendants the Delaware State Escheator and MoneyGram. *See* Complaint, *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 1 (M.D. Pa. Feb. 26, 2016). The Delaware State Escheator and MoneyGram both responded by filing motions to dismiss, arguing, among other things, the district court lacked subject matter jurisdiction. *See* Delaware State Escheator Memo. of Law, *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 26 (M.D. Pa. Apr. 20, 2016) (hereafter, “Escheator Memo”); MoneyGram Memo. of Law, *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 30 (M.D. Pa. Apr. 25, 2016) (hereafter, “MoneyGram Memo”). Specifically, both the Delaware State Escheator and MoneyGram argued that this Court, and this Court alone, had subject matter jurisdiction to resolve the dispute regarding which State had the right to custodial control of the sums payable on abandoned MoneyGram official checks. *See* Escheator Memo at 6 (“This case should be dismissed because it is a controversy between two states, and therefore ... the U.S. Supreme Court has original and exclusive jurisdiction over the controversy.”); MoneyGram Memo at 8 (“Though pled as an action by one state’s officials against a sister state’s official, at the core of this dispute are the equal (but mutually exclusive) sovereign rights of Pennsylvania and Delaware. The

Supreme Court’s jurisdiction over such cases is not only original, but exclusive.”).

In his memorandum, the Delaware State Escheator also raised an issue for the first time: the MoneyGram official checks may not be subject to the Disposition Act at all, but rather are subject only to the common law federal escheat rules from *Texas v. New Jersey*, 379 U.S. 674 (1965). *See* Escheator Memo at 2-3; *see also* Delaware Bill of Complaint at ¶ 10. The Delaware State Escheator also noted in a declaration in support of his motion that nearly \$150 million may be owed to 20 States that also used the same auditor as the Pennsylvania Treasurer, plus an additional \$135 million to States that did not participate in the audit. *See* Gregor decl., *Treasury Department of the Com. v. Delaware State Escheator*, No. 16-cv-351-JEJ, Doc. 25-3 at ¶¶ 15-17 (M.D. Pa. Apr. 20, 2016); *see also* Gregor decl. at A-41, ¶¶ 3-5. All of these sums represent funds remitted to Delaware for abandoned MoneyGram official checks issued in other States. Gregor decl. at A-42, ¶ 6.

In light of the agreement by the Delaware State Escheator and MoneyGram that only this Court had subject matter jurisdiction, and, in light of the Delaware State Escheator putting into controversy the common law escheat rules that only this Court can modify, Pennsylvania Treasury and Treasurer Reese filed an unopposed motion with the district court asking it to administratively suspend the case pending this Court’s disposition of a motion for leave to file a complaint. The Middle District granted the motion on May 23, 2016. *See* Order, *Treasury Department of the*

Com. v. Delaware State Escheator, No. 16-cv-351-JEJ, Doc. 44 (M.D. Pa. May 23, 2016).

III. ARGUMENT

This is an interstate dispute over the right of Pennsylvania, through its Treasurer, to assume custodial control of certain intangible property. In 1961, this Court made clear that it was the appropriate forum for resolution of such controversies:

The rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the States and persons whose rights will be adversely affected by escheats. This makes it imperative that controversies between different States over their right to escheat intangibles be settled in a forum where all the States that want to do so can present their claims for consideration and final authoritative determination. Our Court has jurisdiction to do that.

Western Union Tel. Co. v. Com. of Pa., 368 U.S. 71, 79 (1961). In the intervening years since *Western Union*, the Court has employed its original and exclusive jurisdiction to settle nettlesome interstate escheat disputes. See *Delaware v. New York*, 507 U.S. 490 (1993); *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Texas v. New Jersey*, 379 U.S. 674 (1965). This case is in the same vein as those matters and, as such, this case is appropriate for the Court's consideration.

To illustrate, this Court has original and exclusive jurisdiction over disputes between two States. 28 U.S.C. § 1251(a); U.S. Const. Art. III, § 2, cl. 2. To determine whether a case is appropriate for such original jurisdiction, two factors must be examined. First, the Court must look to “the nature of the interest of the complaining State ... focusing on the seriousness and dignity of the claim[.]” *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (quotations and citations omitted). The “model case” under this factor is “a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.” *Id.* (quoting *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983)). Second, the Court must “explore the availability of an alternative forum in which the issue tendered can be resolved.” *Id.*

Next, though not expressly identified in *Mississippi* as a separate, distinct factor in original jurisdiction matters, whether a case should be heard may also depend upon whether it is a suitable matter for the exercise of the Court’s discretion. *See Nebraska v. Colorado*, 136 S. Ct. 1034, 1035 (2016) (Thomas, J. and Alito, J., dissenting from the denial of motion for leave to file complaint). One consideration in the exercise of discretion may include whether the Court lacks “special competence in dealing with” the particular interstate dispute. *See id.* (quoting *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971)).

Under the above factors, this case is one that should be heard in the Court’s original jurisdiction. Because Delaware already addressed factors one and two and because Pennsylvania is urging the Court to grant Delaware’s Motion, in the interests of brevity

Pennsylvania below only supplies additional considerations regarding factors one (nature of the interest) and three (discretion).

A. This dispute involves sovereign state interests in the custody of unclaimed property, which is historically the precise type of “serious and dignified” claim this Court considers in its original jurisdiction.

“States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat.” *Delaware*, 507 U.S. at 497; *see also Texas*, 379 U.S. at 675 (noting escheat is “a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears”). The disposition of abandoned property by a State represents a “sovereign ‘exercise of a regulatory power’” of that State. *See Delaware*, 507 U.S. at 503 (quoting *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 436 (1951)). State disposition of abandoned property ensures that such property “is used for the general good rather than for the chance enrichment of particular individuals or organizations.” *Standard Oil*, 341 U.S. at 436. In other words, each State has an inherent interest in protecting the ownership rights and welfare of its citizenry from would-be opportunists—be it a private corporation or a co-sovereign State.

In light of the foregoing, disputes involving “interstate escheat” have long been “paradigmatic” disputes deemed suitable for this Court’s exercise of original jurisdiction. *See Connecticut ex rel. Blumenthal*

v. Cahill, 217 F.3d 93, 100 (2d Cir. 2000) (citing Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 515-16 (1995)). Indeed, in *Western Union* in 1961, the Court made plain its view that it is “imperative” that interstate escheat disputes “be settled in a forum where all the States that want to do so can present their claims for consideration and final authoritative jurisdiction.” 368 U.S. at 79. The Court identified itself as the forum for doing so. *Id.*

The complaint submitted here involves the Pennsylvania Treasurer’s statutory responsibility to assume custodial control over unclaimed property generated within Pennsylvania’s borders, yet transported away into the custody of a Delaware official. Were Pennsylvania an independent sovereign, the annual thwarting of its official’s custodial rights by an adjoining sovereign would certainly be a “*casus belli*.” See *Mississippi*, 506 U.S. at 77. And critically (though admittedly not dispositive), the co-sovereign at issue (Delaware) readily admits that the claims in dispute are sufficiently serious and dignified that they should be committed to the Court’s original jurisdiction. See Delaware Brief in Support of Motion for Leave to File at 10-16. Further, given that this matter may also ask the Court to revisit the federal common law rules established in *Texas v. New Jersey*, an area that this Court and this Court alone has authority to change, the dispute is all the more well-suited for the Court’s exclusive review.

B. This is an appropriate case for the exercise of the Court’s discretion.

The Court should exercise its discretion and accept jurisdiction over this interstate dispute because of the

nationwide impact it will have. This is not a regional dispute between neighboring States over a purely regional issue. Instead, the rules established here will impact *every* State, acutely so if the Court addresses the common law issues injected into the dispute by Delaware and which Pennsylvania will challenge in counterclaims.

Further, the issues presented are precisely ones this Court has “special competence” in addressing, *see Nebraska*, 136 S. Ct. at 1035; namely, statutory construction and the review and modification of federal interstate escheat common law. Indeed, as to the latter, this Court is the *only* court with such competence. *See Texas*, 379 U.S. at 677.

Finally, though this case does not present the issue of just how much notice is constitutionally necessary before a State takes custody of abandoned property (an issue that was recently nearly before the Court, *see Taylor v. Yee*, 136 S. Ct. 929 (2016)), it does present the Court with a chance to at least ensure that private property is given to the custodial control of the State where the owner is most likely located. This in turn would ensure that it is the dispossessed owners of the abandoned property, and not the citizens of another State, who are equitably receiving at least an indirect benefit from their property. Indeed, a recent news story noted that Delaware presently receives approximately \$500 million each year in proceeds from unclaimed property, which represents Delaware’s third-largest source of revenue. *See Matthew Alright, Supreme Court Calls Out Delaware on Unclaimed Property*, Delaware Online (Mar. 9, 2016), *available at*

<http://www.delawareonline.com/story/news/local/2016/03/09/supreme-court-unclaimed-property/81524700/>.

In sum, by any measure, this is a suitable case for the Court's original jurisdiction, and the Commonwealth of Pennsylvania respectfully urges the Court to grant Delaware's Motion and immediately allow this matter to proceed.

IV. CONCLUSION

Delaware's Motion for Leave to File Bill of Complaint should be granted.

Respectfully submitted,

Matthew H. Haverstick*
Mark E. Seiberling
Joshua J. Voss
KLEINBARD LLC
One Liberty Place
46th Floor
1650 Market Street
Philadelphia, PA 19103
(215) 568-2000
(215) 568-0140 (fax)
mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com

Christopher B. Craig
Chief Counsel
Treasury Department
Office of Chief Counsel
127 Finance Building
Harrisburg, PA 17120
(717) 787-2740
ccraig@patreasury.gov

*Attorneys for
Commonwealth of
Pennsylvania*

**Counsel of Record*

Dated: June 13, 2016